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No. 08-453

In the Supreme Court of the United States

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. AND OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF RESIDENTIAL MORTGAGE REGULATORS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae American Association of Residential Mortgage Regulators ("AARMR") is the national association of state officials who regulate home mortgage lenders, servicers and brokers throughout the United States.[1] AARMR's members work within various state banking, consumer protection, and other agencies charged with enforcing state laws designed to prevent unfair and abusive practices related to residential mortgage loans. AARMR's mission includes facilitating the exchange of relevant information between and among state regulators; promoting a better understanding of mortgage regulation; developing model legislation; and sponsoring seminars and training programs.

The context surrounding this case is compelling. Our nation has experienced an economic boom and crash since January 2004, when the Office of the Comptroller of the Currency ("OCC") issued the preemptive regulation at the heart of this case. In particular, the past five years witnessed a reckless expansion and sudden collapse of the residential mortgage industry, followed by an unprecedented wave of foreclosures nationwide.

The OCC's regulation effected a significant change. For over 200 years, the States – acting in a realm

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

generally and wisely left to them by Congress – have enacted and enforced laws designed to protect consumers against abusive and unfair financial services practices. Recently, the States have played a leading role in combating predatory mortgage lending. With the recent enactment of the "S.A.F.E. Mortgage Licensing Act of 2008," 12 U.S.C. §§ 5101, *et seq.,* Congress expressly recognized the States' important role in this area by encouraging "the States, through the Conference of State Bank Supervisors and [AARMR], . . . to establish a Nationwide Mortgage Licensing System and Registry ["NMLS"] for the residential mortgage industry." *Id.* § 5102. The NMLS's purposes are to "enhance[] consumer protections" and "facilitate[] responsible behavior in the subprime mortgage market place." *Id.* The States have swiftly responded. "[T]he NMLS is now being utilized by 23 agencies in 22 states [and] [a]n additional 14 states have already committed to joining NMLS this year." Larry Collins, *The Mass Banker Interview,* Massachusetts Banker, 16, 18 (First Quarter 2009) (quoting Massachusetts Commissioner of Banks Steven L. Antonakes).

This is not a standard preemption case. The OCC regulation prevents state officials from enforcing valid state laws against national banks, even though no Act of Congress has preempted those laws. The regulation impairs the ability of AARMR's members and other state officials to enforce state mortgage lending laws. It also undermines the congressional policy of maintaining competitive equality between state-chartered banks and national banks. In upholding the regulation, moreover, the decision below ignored fundamental principles that underlie our nation's federal structure. This case is therefore of great

concern to AARMR, which submits this brief to assist the Court.

STATEMENT

The central issue in this case whether OCC possessed statutory authority to adopt a regulation barring state officials from enforcing valid, non-preempted state laws against national banks. The regulation declares that OCC has exclusive authority to "exercise visitorial powers with respect to national banks," except as otherwise provided by federal law. 12 C.F.R. § 7.4000(a)(1). As amended in 2004, the regulation purports to "interpret and implement" 12 U.S.C. § 484(a). 69 Fed. Reg. 1895, 1895 (Jan. 13, 2004). Section 484(a) provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice" or exercised under congressional authority.

OCC's regulation defines "visitorial powers" to include "[e]nforcing compliance with any applicable federal or state laws" with respect to any activity that is permissible for national banks under federal law. 12 C.F.R. § 7.4000(a)(2)(iv). The regulation acknowledges, in accordance with § 484(a), that "[n]ational banks are subject to such visitorial powers as are vested in the courts of justice." *Id.* § 7.4000(b)(2). However, the regulation asserts that the "vested in the courts of justice" clause of § 484(a) does not allow any state official to use judicial process to "compel compliance by a national bank" with any state law affecting "activities authorized for national banks under Federal law." *Id.* The regulation therefore preempts the authority of state officials to use judicial proceedings to enforce valid state laws

against national banks. *See* 69 Fed. Reg. at 1895, 1899-1900. By virtue of 12 C.F.R. § 7.4006, the preemptive scope of § 7.4000 extends to operating subsidiaries of national banks. *See* 69 Fed. Reg. at 1900-02; *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1, 20-22 (2007) (rejecting a challenge to the validity of § 7.4006).

This case involves the New York Attorney General's investigation of possible violations of N.Y. Executive Law § 296-a, a state law which bars racial and ethnic discrimination in mortgage lending. The investigation was prompted by data indicating that certain lenders made significantly higher percentages of high-interest loans to minorities. Respondents OCC and Clearing House Association blocked the investigation with respect to national banks by obtaining injunctive relief from the courts below, based on 12 C.F.R. § 7.4000. Pet. Brief at 12-17.

SUMMARY OF ARGUMENT

1. The Second Circuit Court of Appeals erred when it held that 12 C.F.R. § 7.4000 was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), and when the court refused to apply a presumption against preemption of Petitioner's authority to enforce N.Y. Executive Law § 296-a. In practical effect, the Second Circuit applied a presumption *in favor* of OCC's authority to preempt state laws – a presumption that could not be overcome without an unambiguous statement of congressional intent to forbid OCC's action. There are four reasons why this Court should reverse the Second Circuit's decision.

First, this Court should hold that *Chevron* does not apply to a federal agency regulation that purports to preempt a traditional regulatory power of the States. The power of Congress to adopt legislation preempting "areas traditionally regulated by the States . . . is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Accordingly, the judiciary should undertake a *de novo* review of each preemptive regulation to ensure that the federal-state balance is not altered without a clearly-expressed determination by Congress.

Second, the Second Circuit should have applied a presumption *against* preemption because (i) the States have a long history of regulating banks and other financial institutions for the purpose of protecting consumers and assuring fair lending, and (ii) this Court has repeatedly upheld the general application of state laws to national banks.

Third, OCC has a financial self-interest in issuing preemptive regulations. The agency's budget is mainly funded by national bank assessments. OCC has advertised its preemption initiatives as a major reason why large, multistate banks, which pay larger assessments, should operate under national charters. This economic motive should disqualify OCC preemptive rules from attracting any deference.

Fourth, OCC's regulation raises serious questions under the Tenth Amendment because it preempts the States' sovereign authority to enforce their own laws. This Court should therefore deny OCC's claim to *Chevron* deference and should invalidate § 7.4000 in

the absence of any clear statement of supporting congressional intent.

2. Even if *Chevron* applies to this case, § 7.4000 does not qualify for deference unless it was "promulgated pursuant to authority Congress has delegated to the [OCC]." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). OCC does not possess the requisite delegated authority, because the National Bank Act ("NBA"), 12 U.S.C., §§ 1-216d, does not empower OCC to preempt the States' authority to enforce valid State laws against national banks.

Ever since the NBA was enacted in 1864, Congress has provided "the courts of justice" with independent visitorial powers over national banks. 12 U.S.C. § 484(a). Neither § 484(a) nor any other provision of the NBA restricts the authority of state officials to sue national banks for violations of state laws. In fact, the NBA provides that national banks may "sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." *Id.* § 24 (Fourth). OCC's limited rulemaking powers under 12 U.S.C. §§ 371(a) and 93a do not authorize a regulation barring lawsuits by state officials to enforce valid state laws against national banks.

For more than a century, courts have affirmed the authority of state officials to sue national banks for violations of state law. In *First Nat'l Bank in St. Louis v. Missouri,* 263 U.S. 640 (1924), for example, this Court upheld the State's power to "vindicate and enforce its own law" against a national bank, notwithstanding the federal government's claim of exclusive authority to bring judicial enforcement proceedings against the bank. *Id.* at 660. This case

presents the same situation as *St. Louis* and calls for the same result.

ARGUMENT

I. OCC's REGULATION SHOULD NOT RECEIVE *CHEVRON* DEFERENCE.

A. *Chevron* Should Not Apply to a Federal Agency Regulation That Preempts a Traditional Regulatory Power of the States.

1. *Chevron* Deference Should Be Denied When a Federal Agency Asserts Authority to Preempt a Traditional State Regulatory Power.

This Court has never ruled definitively on the question of whether federal agencies' preemptive regulations are entitled to receive *Chevron* deference. However, it has acknowledged that serious doubts exist concerning the propriety of such deference. For example, in *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735 (1996), the petitioner contended that a reviewing court must "make its own interpretation of [the federal statute] that will avoid (to the extent possible) pre-emption of state law." *Id.* at 743-44. After noting the petitioner's argument, the Court assumed without deciding that the question of a statute's preemptive effect "must always be decided *de novo* by the courts." *Id.* at 744.

In *Watters v. Wachovia Bank, N.A.,* the petitioner similarly argued that "because preemption is a legal question for determination by the courts, [12 C.F.R.]

§ 7.4006 should attract no deference." 550 U.S. 1, 20 (2007). The majority opinion did not directly address the petitioner's argument. Instead, it held that "the level of deference owed to the regulation is an academic question," *id.*, because "the NBA itself – independent of OCC's regulation – preempts the application of the pertinent Michigan laws to national bank operating subsidiaries." *Id.* at 21 n.13.

The three dissenting Justices in *Watters* did address the *Chevron* issue. They maintained that "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for *something less than Chevron deference*." *Id.* at 41 (Stevens, J., dissenting, joined by Roberts, C.J., and Scalia, J.) (emphasis added). The dissenting Justices also stated that the Court should have rejected OCC's preemption claim in the absence of a "clear and manifest purpose of Congress" because "[c]onsumer protection is quintessentially a field which the States have traditionally occupied." *Id.* at 35-36 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) (internal quotation marks omitted).

This Court should now hold that *Chevron* deference is not appropriate when a federal agency issues an order or rule declaring that a traditional regulatory power of the States is preempted. Instead, the courts should undertake a *de novo* review of agency preemption determinations to ensure that preemption issues are resolved in accordance with the Constitution's allocation of federal and state powers. The power of Congress to adopt legislation preempting "areas traditionally regulated by the States . . . is an extraordinary power in a federalist system. It is a power that we must assume Congress does not

exercise lightly." *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991). This Court has therefore required Congress to "make its intention clear and manifest if it intends to pre-empt the historic powers of the States." *Id.* at 461 (citations and internal quotation marks omitted). *See also United States v. Lopez,* 514 U.S. 549 (1995), where Justices Kennedy and O'Connor observed that "the whole jurisprudence of preemption" is one of the important ways in which "this Court has participated in maintaining the federal balance." *Id.* at 578 (Kennedy, J., concurring, joined by O'Connor, J.).

Although *Chevron* deference was not at issue in *Gregory*, the Court declared that "[w]e must be absolutely certain that Congress intended" to adopt legislation that alters the "state-federal balance." *Gregory,* 501 U.S. at 464. As *Gregory* pointed out, to "give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Id.* (quoting Laurence H. Tribe, *American Constitutional Law* § 6.25, p. 480 (2d ed. 1988), and citing *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528 (1985)).

In a leading decision involving the NBA, this Court held that the success of a preemption claim depends on whether "language in the federal statute . . . reveals an *explicit* congressional intent to pre-empt state law" or, if not, whether "the federal statute's 'structure and purpose,' or nonspecific statutory language, nevertheless reveal a *clear, but implicit*, pre-emptive intent." *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 31 (1996) (emphasis added) (quoting *Jones v. Rath Packing Co.,* 430 U.S. 519, 525

(1977)). *Barnett* did not consider the issue of *Chevron* deference. However, applying the *Chevron* framework to an agency's preemptive ruling directly conflicts with the preemption standard *Barnett* articulated, because *Chevron* permits a reviewing court to uphold an agency's interpretation of federal law even if the governing statute is "silent or ambiguous." *Chevron,* 467 U.S. at 843.

The decision below demonstrates that granting *Chevron* deference to preemptive orders and rules will give federal agencies virtually unlimited discretion to override state law as long as federal statutes do not unambiguously forbid the agencies' preemption claims. The Second Circuit stated that "[a]lthough the precise scope of 'visitorial' powers is not entirely clear from the text of [12 U.S.C.] § 484(a), . . . we cannot agree . . . that the statute clearly precludes the interpretation the OCC has adopted." Pet. App. 21a. Thus, the Second Circuit's application of *Chevron* deference effectively created a presumption *in favor* of OCC's authority to preempt state law. That result, however, is inconsistent with *Louisiana Public Serv. Comm'n v. FCC,* 476 U.S. 355 (1986), in which this Court stated that "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Id.* at 369; *see also id.* at 374 ("an agency literally has no power to act, let alone . . . pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it").

The judiciary's role in preserving the state-federal balance within our constitutional framework strongly counsels against granting *Chevron* deference when a court evaluates the validity of an agency's preemption

determination.[2] Given our nation's fundamental commitment to federalism, a reviewing court should not rely on an agency's interpretation of an "ambiguous" statute to justify a finding that Congress intended to preempt a traditional regulatory power of the States.

2. State Laws Regulating Financial Institutions to Protect Consumers and Assure Fair Lending Are Within the States' Traditional Police Powers and Should Not Be Preempted Without a Clear Expression of Congressional Intent.

Pursuant to their police powers, the States have long regulated banks and other financial institutions for the purpose of protecting consumers and assuring fair lending. In *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27 (1980), the Court declared:

> We readily accept the submission that, both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern. . . . [S]ound financial institutions and honest financial practices are essential to the health of

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[2] *See* Nina A. Mendelson, *A Presumption Against Agency Preemption,* 102 Nw. U. L. Rev. 695, 698-99, 705-06 (2008) (arguing that *Chevron* deference should not apply to federal agency preemption determinations because agencies lack the requisite "expertise on important issues of state autonomy and federalism," *id.* at 698); *accord,* Nicholas Bagley, *Note: The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274, 2293-97 (2004).

> any State's economy and to the well-being of its people. Thus, it is not surprising that ever since the early days of our Republic, the States have chartered banks and have actively regulated their activities.

Id. at 38; accord, *Northeast Bancorp v. Bd. of Governors*, 472 U.S. 159, 177-78 (1985).

This Court has repeatedly upheld the general applicability of state laws to national banks. *Atherton v. FDIC*, 519 U.S. 213 (1997) ruled that "federally chartered banks are subject to state law." *Id.* at 222. In support of that principle, *Atherton* quoted decisions reaching back to an 1870 case, which held that national banks

> are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when State law incapacitates the [national] banks from discharging their duties to the federal government that it becomes unconstitutional.

Id. at 222-23 (quoting *Nat'l Bank v. Commonwealth,* 76 U.S. (9 Wall.) 353, 362 (1870)).

Likewise, *Barnett* held that States have "the power to regulate national banks" where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 33.

In *Watters,* the Court similarly recognized that "[f]ederally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA." 550 U.S. at 11. In two earlier decisions, the Court explained that "the operation of general state laws upon the dealings and contracts of national banks" is the "rule," while preemption is an "exception" that applies only when state laws "expressly conflict with the laws of the United States or frustrate the purpose for which national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States." *First Nat'l Bank in St. Louis,* 263 U.S. at 640, 656 (1924) (quoting *McClellan v. Chipman,* 164 U.S. 347, 357 (1896)).[3]

Congress has preserved the vitality of the dual banking system by relying on state law to help maintain a basic parity of competitive opportunities between state and national banks.[4] This "policy of equalization" has been carried out by applying state laws to national banks in two ways – first, by

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[3] *Accord, Anderson Nat'l Bank v. Luckett,* 321 U.S. 233, 248 (1944) ("This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions"); *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559, 566 (1934) ("[A] national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law").

[4] *See* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection,* 23 Ann. Rev. Banking & Fin. L. 225, 253-65 (2004).

"expressly incorporat[ing] state-law standards into several federal statutes," and second, "through statutory silence [that] permits state laws to govern other aspects of the operations of national banks *except* in situations where a state law creates an irreconcilable conflict with federal law."[5]

Congress expressed its strong support for the presumptive application of state laws to national banks when it passed the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 ("Riegle-Neal Act"). The Riegle-Neal Act requires interstate branches of national banks to comply with host state laws in four broadly-defined areas – community reinvestment, consumer protection, fair lending and intrastate branching – unless federal law preempts the application of such laws to national banks. 12 U.S.C. § 36(f)(1)(A). Explaining why state laws are generally applicable to national banks, the conference report on the Riegle-Neal Act concluded:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses and communities. . . .

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[5] *Id.* at 266. *See Lewis v. Fidelity & Deposit Co.,* 292 U.S. at 564-66 (describing both methods for applying state laws to national banks and observing that the NBA reflects a congressional "policy of equalization" between the national and the state banking systems).

. . . .

> Under well-established judicial principles, national banks are subject to State law in many significant respects. . . . Courts generally use a rule of construction that avoids finding a conflict between the Federal and State law where possible. The [Riegle-Neal Act] does not change these judicially established principles.[6]

By referring to "judicially established principles" under which "national banks are subject to State law in many significant respects," the Riegle-Neal conferees clearly indicated their agreement with judicial decisions such as *First Nat'l Bank in St Louis, McClellan, Luckett, Lewis v. Fidelity & Deposit Co.* and *Nat'l Bank v. Commonwealth*, all of which upheld the general application of state laws to national banks.

The Riegle-Neal Act expressly confirms the general applicability of state fair lending laws to multistate national banks. 12 U.S.C. § 36(f)(1)(A). Additional congressional support for state fair lending laws appears in the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("ECOA"). ECOA prohibits all "creditors" – a category that includes national and state banks – from discriminating on the basis of several characteristics, including race and national origin. *Id.* §§ 1691(a), 1691a(e). ECOA explicitly preserves the States' authority to enact laws prohibiting lending discrimination that are consistent with the federal statute. Notably, ECOA upholds state

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[6] H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.) *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

laws that give "greater protection" to borrowers than the protection afforded under ECOA. *Id.* § 1691d(f).

When Congress endorsed the application of state laws to national banks in the Riegle-Neal Act, it acted consistently with the presumption against preemption that this Court has applied in fields of traditional state regulation. For example, in *California v. ARC America Corp.,* 490 U.S. 93 (1989), the Court applied a "presumption against finding pre-emption of state law in areas traditionally regulated by the States" in order to ensure that "the historic police powers of the States" are not "superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 101 (quoting *Rice,* 331 U.S. at 230) (internal quotation marks omitted). The Court also affirmed that state laws prohibiting "unfair business practices" fall within "an area traditionally regulated by the States." *Id.*[7] As the dissenting Justices pointed out in *Watters*, the presumption in favor of the validity of state regulation is consistent with this Court's decisions under the NBA. *See* 550 U.S. at 23-26, 31, 35-38 (Stevens J., dissenting, joined by Roberts, C.J., and Scalia, J.).

Accordingly, state laws protecting consumers and assuring fair lending are valid exercises of the States' historic police powers over financial institutions. Such

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[7] For other decisions applying a presumption against preemption in affirming the validity of state consumer protection laws, *see e.g., Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516-20, 525-30 (1992) (applying presumption in upholding state laws providing remedies for breach of contract, fraud and misrepresentation); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963) (similarly upholding a state law "designed to prevent the deception of consumers").

laws presumptively apply to national banks. As the Second Circuit acknowledged, all parties agree that the NBA does *not* preempt N.Y. Executive Law § 296-a. *See* Pet. App. 15a, 29a. This Court should therefore invalidate OCC's regulation preempting New York's authority to enforce § 296-a because there is no clear expression of supporting congressional intent. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

B. OCC's Preemptive Rules Should Not Qualify for *Chevron* Deference Because They Are Tainted by the Agency's Financial Self-Interest.

OCC's financial motive to issue preemptive rules provides a special and compelling reason for rejecting its appeal for *Chevron* deference. Section 7.4000 is one of a series of preemptive rules and orders that OCC has issued in recent years. *See, e.g., Watters,* 550 U.S. at 20-21 (discussing 12 C.F.R. § 7.4006, which preempts the application of state laws to operating subsidiaries of national banks); 69 Fed. Reg. 1904 (2004) (adopting 12 C.F.R. §§ 7.4007-7.4009 and 34.4, which preempt the application of a wide range of state laws to national banks). In defending OCC's preemption initiatives, a former head of the agency declared that preemption of state law is "a significant benefit of the national [bank] charter – a benefit that the OCC has fought hard over the years to preserve."[8]

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[8] Speech by Comptroller of the Currency John D. Hawke, Jr., on Feb. 12, 2002, quoted in Wilmarth, *supra* note 4, at 236, 274.

OCC has a strong economic interest in persuading the largest banks to operate under national charters. OCC's budget is almost entirely funded by national bank assessments, and the biggest banks pay the highest assessments.[9] In response to OCC's aggressive preemption efforts, several large, multistate banks have converted from state to national charters in recent years, thereby producing a significant increase in OCC's assessment revenues.[10]

Moreover, OCC's record of enforcing consumer protection laws has been described as a "long history of inaction," "weak" and "unimpressive."[11] Publicly available information indicates that, during 1995-2007, OCC issued only 13 public enforcement orders against national banks for violations of consumer protection laws.[12] Only one of those orders included a

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[9] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 93-94 (Nov. 2008); Wilmarth, *supra* note 4, at 276.

[10] Bar-Gill & Warren, *supra* note 9, at 81-83, 93-94 (citing charter conversions by three large banks, which moved one trillion dollars of assets from the state banking system to the national banking system); Wilmarth, *supra* note 4, at 233-36, 274-79, 289-93.

[11] Bar-Gill & Warren, *supra* note 9, at 90-95 (quote at 94); Amy Quester & Kathleen Keest, *Looking Ahead After* Watters v. Wachovia Bank*: Challenges for Lower Courts, Congress, and the Comptroller of the Currency*, 27 Rev. Banking & Fin. L. 187, 195-97 (2008) (quote at 195); Wilmarth, *supra* note 4, at 232 (quote), 274-77, 289-93, 310-16, 351-56.

[12] *See* Bar-Gill & Warren, *supra* note 9, at 92-93; Wilmarth, *supra* note 4, at 353, 355-56; Stephanie Mencimer, "No Account," *New Republic*, Aug. 27, 2007, at 14.

charge that the bank violated state laws.[13] In that one case, OCC took action only after the public became aware that a California prosecutor was investigating the offending bank.[14]

The States' record presents a dramatic contrast. During the past decade, more than thirty states have enacted laws to combat predatory lending.[15] The New York Attorney General and other state officials have vigorously used their enforcement powers to protect consumers and prosecute financial service providers for a wide range of unlawful practices.[16] In 2003 alone, "state bank supervisory agencies performed more than 20,000 investigations in response to consumer complaints about abusive lending practices, and those

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[13] *See In re Providian Nat'l Bank,* June 28, 2000, 2000 OCC Enf. Dec. LEXIS 55, at *1 (alleging violations of California statutes prohibiting unfair business practices).

[14] Wilmarth, *supra* note 4, at 316 & n.357; "Correspondence," *New Republic*, Oct. 8, 2007, at 7 (response by Stephanie Mencimer to letter from Comptroller of the Currency John C. Dugan).

[15] *See* Baher Azmy, *Squaring the Predatory Lending Circle,* 57 Fla. L. Rev. 295, 300-03, 361-81, 391-400 (2005); Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders,* 74 U. Cin. L. Rev. 1303, 1308-10, 1319-22, 1359-68 (2006).

[16] *E.g.,* Wilmarth, *supra* note 4, at 316, 348-52, 354-55; Amir Efrati & Aaron Lucchetti, "U.S. News: Cuomo Blazes Own Trail as Wall Street Cop," *Wall St. J.,* Aug. 11, 2008, at A3; Brooke Masters, "In Spitzer's Footsteps: Cuomo Trains His Sights On Financial Services," *Fin. Times*, June 5, 2007, at 1.

investigations produced more than 4,000 enforcement actions."[17]

OCC has substantially obstructed the States' efforts to protect consumers from predatory lending practices. By preempting state laws and state enforcement proceedings, OCC has (i) undermined the effectiveness of state predatory lending laws,[18] and (ii) contributed to the severity of the current credit crisis by "stifling . . . prescient state enforcers and legislators" who tried to prevent irresponsible lending.[19] For example, OCC issued rulings declaring that Georgia officials were preempted from applying the Georgia Fair Lending Act not only to national banks and their operating subsidiaries, but also to

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[17] Wilmarth, *supra* note 4, at 316 (quoting 2004 House budget committee document); *see also* Eric Nalder, "Mortgage System Crumbled While Regulators Jousted," *Seattle Post-Intelligencer*, Oct. 11, 2008, at A1 (reporting that "States . . . took 3,694 enforcement actions against mortgage lenders and brokers in 2006 alone, according to congressional testimony").

[18] *E.g.,* Bar-Gill & Warren, *supra* note 9, at 81-82, 90-95; Forrester, *supra* note 15, at 1339-42, 1349-53; Quester & Keest, *supra* note 11, at 223-37; Wilmarth, *supra* note 4, at 306-16, 348-52.

[19] *E.g.,* Robert Berner & Brian Grow, "They Warned Us: The Watchdogs Who Saw the Subprime Disaster Coming – and How They Were Thwarted by the Banks and Washington," *Bus. Wk.*, Oct. 20, 2008, at 36, 38; *see also* Nicholas Bagley, "Subprime Safeguards We Needed," *Wash. Post*, Jan. 25, 2008, at A19; Nalder, *supra* note 17 (reporting that "[w]hen [Washington] state investigators spotted questionable loan practices, the feds rejected their help and informed the state that it had no business looking into the affairs of federally chartered institutions").

mortgage brokers who arranged loans funded at closing by national banks or their subsidiaries.[20]

OCC's anemic enforcement record is consistent with its strong budgetary incentives to follow policies that encourage large banks to operate under national charters. Given OCC's self-interest in adopting preemptive regulations, those rules should be denied any deference under *Chevron*.[21]

Moreover, OCC does not have adequate resources to assume duties that fall well outside its core responsibility for ensuring the safety and soundness of national banks. Recent events demonstrate that OCC should focus its attention on improving its supervisory procedures and preventing bank failures. For example, the Treasury Department's Office of Inspector General issued a highly critical audit report in November 2008, describing numerous shortcomings in OCC's supervision with respect to the failed ANB Financial, N.A., of Bentonville, Arkansas. *See* Audit Report OIG-09-013, at 13-23 (Nov. 25, 2008). OCC should not arrogate to itself additional consumer protection responsibilities that are better handled by the States.

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[20] Preemption Determination and Order, 68 Fed. Reg. 46,264 (Aug. 5, 2003); OCC Interpretive Letter No. 1002, May 13, 2004, from Comptroller of the Currency John D. Hawke, Jr. to Georgia Banking Commissioner David G. Sorrell.

[21] Wilmarth, *supra* note 4, at 232-33, 293-98; *see also* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol'y 203, 206-07, 286 (2004).

C. OCC's Regulation Raises Serious Questions Under the Tenth Amendment and Should Not Be Upheld in the Absence of a Clear Statement of Congressional Intent.

The challenged regulation bars the States from enforcing state laws such as N.Y. Executive Law § 296-a against national banks or their operating subsidiaries. *See* 12 C.F.R. § 7.4000 (a)(2)(iv) & (b)(2). The regulation therefore infringes upon the States' sovereign power to enforce their laws and raises serious questions under the Tenth Amendment.

The authority of States to enforce their criminal laws "derive[s] from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." *Heath v. Alabama,* 474 U.S. 82, 89 (1985). In *United States v. Wheeler,* 435 U.S. 313 (1978), *superseded by statute on other grounds*, Pub. L. No. 102-137, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301 (2)), *as recognized in United States v. Lara*, 541 U.S. 193, 197-98 (2004), this Court affirmed that each State "has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses." *Id.* at 320.

The majority opinion below, however, concluded that OCC's regulation "preserves state sovereignty" simply because non-preempted state laws "remain enforceable by private parties, as well as by the OCC itself." Pet. App. 29a. That conclusion is plainly at odds with this Court's statements in *Heath* and *Wheeler*. It also conflicts with practical reality. As

Judge Cardamone observed in his dissent below, "[i]t is difficult to imagine a more core aspect of state sovereignty than the authority to pass and enforce valid nonpreempted state laws." Pet. App. 55a (Cardamone, J., dissenting). *See also Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (stating the common sense proposition that "[o]ur federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them") (quoting *McClesky v. Zant,* 499 U.S. 467, 491 (1991)).

OCC's *concurrent* authority to enforce state laws against national banks under 12 U.S.C. §1818 does not extinguish the States' sovereign power to enforce their laws against national banks. This Court has repeatedly held that a State's sovereign interest in enforcing its criminal laws cannot be diminished by the fact that other entities have power to enforce similar laws against the same persons. *Heath* declared that "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by *another* State's enforcement of *its* own laws." 474 U.S. at 93 (emphasis added). *See also Bartkus v. Illinois*, 359 U.S. 121, 137 (1959) (stating that "[i]t would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States") (footnote omitted).

OCC's claim of exclusive authority to enforce state laws threatens to mislead the public concerning the effectiveness of state enforcement of state laws protecting consumers of financial services. *See* Pet.

App. 59a (Cardamone, J., dissenting) (noting that 12 C.F.R. § 7.4000 "confuses which governmental entity citizens should hold accountable for the enforcement of state laws against national banks"). OCC's regulation therefore diminishes political accountability, which is one of the crucial checks and balances within our federal system.

In *New York v. United States,* 505 U.S. 144 (1992), this Court invalidated a comparable federal invasion of state sovereignty. *New York* struck down a federal law that used coercive measures to interfere with the States' regulatory and enforcement authority. The challenged statute in *New York* would have forced state governments to carry out a congressionally-mandated radioactive waste disposal program. This Court held that the provision was unconstitutional because it "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176 (internal quotation marks and citation omitted). This anti-commandeering principle was based on the Court's concern that political accountability is "diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *Id.* at 169.

The federal law struck down in *New York* was the mirror image of the OCC regulation at issue here. In *New York*, Congress *compelled* the States to implement a *federal* mandate. In this case, 12 C.F.R. § 7.4000 *prevents* the States from enforcing a *State* mandate. In each case, the federal provision is unlawful because it treats the States as "mere political subdivisions of the United States" and fails to

recognize the "'residuary and inviolable sovereignty,'. . . reserved explicitly to the States by the Tenth Amendment." *Id.* at 188 (quoting *The Federalist* No. 39, p. 245 (C. Rossiter ed. 1961)).

In an analogous case, this Court refused to give *Chevron* deference to an agency regulation because the rule interpreted a federal statute in a manner that "alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001). The Court "reject[ed] the request for administrative deference" in order to "avoid the significant constitutional and federalism questions" created by the agency's interpretation. *Id.* at 174. The Court then struck down the regulation in the absence of "a clear statement from Congress that it intended . . . to readjust the federal-state balance." *Id.*

For the same reasons, 12 C.F.R. § 7.4000 should not receive *Chevron* deference. As shown above, § 7.4000 significantly alters the state-federal balance by preempting the States' sovereign authority to enforce valid state laws against national banks. Moreover, as demonstrated below, § 7.4000 is unsupported by any clear statement of congressional intent.

II. EVEN IF *CHEVRON* APPLIES, OCC'S REGULATION SHOULD NOT RECEIVE DEFERENCE.

A. Congress Has Not Authorized OCC to Prohibit States from Enforcing Valid State Laws.

This Court has made clear that "*Chevron* deference . . . is not accorded [to a regulation] merely because the statute is ambiguous and an administrative [agency] is involved." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). Instead, the regulation must be "promulgated pursuant to authority Congress has delegated to the [agency]." *Id.*; *accord, Adams Fruit Co. v. Barrett,* 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority"). The challenged regulation is invalid because Congress has not authorized OCC to bar the States from enforcing valid state laws.

The Second Circuit relied primarily on 12 U.S.C. § 484(a). That reliance was misplaced. The preemption which derives from § 484(a) is limited to state laws which intrude on OCC's "visitorial powers" and does not extend to the enforcement of state fair lending laws such as the N.Y. Executive Law § 296-a. Section 484(a) provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or [exercised by Congress or a committee thereof]." The original NBA, enacted in 1864 (the "1864 Act"), included a similar limitation on "visitorial" powers in the same section that authorized OCC to make periodic examinations of national banks. *See* Act of June 3, 1864, c. 106, § 54, 13 Stat. 116. The 1864 Act

also empowered OCC to make special examinations of national banks in formation to determine whether embryonic banks should be given certificates of authority to "commence the business of banking." Act of June 3, 1864, *supra*, §§ 17, 18, 13 Stat. 104, 105.

The current NBA provides OCC with the same examination and chartering powers. *See* 12 U.S.C. §§ 481, 26, 27. After noting OCC's authority to charter and examine national banks, this Court in *Watters* construed § 484(a) in a manner consistent with that authority, holding that it precludes the States from imposing "licensing, registration, and inspection requirements" on national banks. 550 U.S. at 14-15.

The 1864 Act, like the current NBA, authorized OCC to appoint receivers for insolvent national banks or banks that fail to redeem their circulating notes. *See* Act of June 3, 1864, *supra*, §§ 31, 32, 50, 13 Stat. 108-09, 114-15 (codified as amended in 12 U.S.C. §§ 191, 192). The power to appoint receivers is a significant source of administrative enforcement authority for OCC. *See Cooper v. O'Connor*, 99 F.2d 135, 139 (D.C. Cir.), *cert. denied,* 305 U.S. 643 (1938) (noting that OCC is empowered to place a receiver "in complete charge" of a national bank).[22] In *Watters,* after considering OCC's administrative enforcement powers, this Court concluded that a State "cannot confer on its [banking] commissioner examination and enforcement authority over mortgage lending, or any

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[22] Since 1966, OCC has exercised additional administrative enforcement powers over national banks under 12 U.S.C. § 1818, including the authority to enforce applicable state laws. *See infra* note 24.

other banking business done by national banks." 550 U.S. at 14-15 (footnote omitted).[23]

Watters is consistent with *Guthrie v. Harkness*, 199 U.S. 148 (1905). *Guthrie* explained that OCC's administrative powers of "investigation" (through bank examinations) and "appointment of a receiver" were the key "visitorial powers" referred to in 12 U.S.C. § 484(a). *Id.* at 159. However, *Guthrie* also observed that "visitorial powers . . . 'vested in the courts of justice'" are "*expressly excepted* from the inhibition of [§ 484(a)]." *Id.* (emphasis added). As shown *infra* in Part II.B., the courts routinely permitted lawsuits by state officials to enforce state laws against national banks until 2004, when OCC amended 12 C.F.R. § 7.4000.

The "vested in the courts of justice" clause originally appeared in § 54 of the 1864 Act, which affirmed that "the several courts of law and chancery" could exercise "visitorial powers" over national banks. Act of June 3, 1864, *supra*, § 54, 13 Stat. 116. The current language of § 484(a), like § 54, does not restrict the authority of state officials to bring judicial enforcement actions against national banks. The plain language of § 484(a) therefore contradicts 12 C.F.R.

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[23] *Watters* dealt only with the question of whether a state official could exercise certain types of administrative enforcement powers over national banks and their operating subsidiaries. *See* 550 U.S. at 9-10 (describing the administrative powers of Michigan's banking commissioner). *Watters* did not consider whether § 484(a) bars the States from enforcing valid state laws against national banks by using other methods, including judicial proceedings. As the Second Circuit acknowledged, "*Watters* does not directly address the questions at issue here." Pet. App. 20a.

§ 7.4000(b)(2), which bars state officials from filing suits in "the courts of justice" to enforce state laws against national banks.

Other provisions of the NBA confirm that Congress has not limited the right of state officials to sue national banks for violations of state law. The 1864 Act, like the current NBA, included a provision authorizing each national bank to "sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." Act of June 3, 1864, § 8, 13 Stat. 101 (codified as amended at 12 U.S.C. § 24 (Fourth)). The 1864 Act also gave federal and state courts concurrent jurisdiction over "suits, actions, and proceedings" against national banks. *Id.*, § 57, 13 Stat. 116-17.

The 1864 Act contained only two exceptions to this general grant of concurrent jurisdiction to federal and state courts over suits against national banks. First, a proviso to § 57 stipulated that federal courts would have exclusive jurisdiction over "all proceedings to enjoin the [OCC]." *Id.*, 13 Stat. 117. Second, § 53, like the current NBA, authorized OCC to sue in federal court to rescind the charter of a national bank if its directors "knowingly violate, or knowingly permit any of [its] officers, agents, or servants . . . to violate" the NBA. *Id.* § 53, 13 Stat. 116 (codified as amended at 12 U.S.C. § 93(a)). Neither § 57 nor § 53 restricted the authority of state officials to file lawsuits against national banks in state or federal courts.[24]

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[24] Section 53 of the 1864 Act – like its successor, 12 U.S.C. § 93(a) – did not authorize OCC to sue national banks for violations of state law. Since 1966, Congress has empowered OCC to (i) issue

The provisions of § 57, as modified by later statutes, were ultimately codified at 12 U.S.C. § 1348.[25] Section 1348 gives federal district courts exclusive original jurisdiction over (i) suits filed by federal officials against national banks, (ii) proceedings to wind up the affairs of national banks, and (iii) actions by national banks "to enjoin the Comptroller of the Currency or any receiver acting under his direction." However, § 1348 also provides that national banks "shall, for the purposes of *all other actions* by or *against them*, be deemed citizens of the States in which they are respectively located." 12 U.S.C. § 1348 (emphasis added). Accordingly, § 1348 preserves the general concurrent jurisdiction of state and federal courts over suits involving national banks, and § 1348 does not bar suits by state officials.

OCC's regulation conflicts with the NBA, and it therefore exceeds OCC's rulemaking authority. Under 12 U.S.C. § 371(a), OCC may issue regulations that prescribe "restrictions and requirements" for real estate loans made by national banks. However,

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administrative enforcement orders against national banks based on violations of federal or state law, and (ii) seek judicial enforcement of such orders. *See* 12 U.S.C. § 1818(b), (c), (d), (i). However, § 1818 does not restrict the authority of state officials to sue national banks for violations of state laws. When Congress adopted the 1966 amendments to § 1818, it indicated that it "did not wish to take any action which would do violence to the balance between State and Federal functions and responsibilities which underlies the dual banking system." S. Rep. No. 89-1482 (1966), reprinted in 1966 U.S.C.C.A.N. 3532, 3538.

[25] *Mercantile Nat'l Bank at Dallas v. Langdeau,* 371 U.S. 555, 559-61, 565-67 (1963); *see also Wachovia Bank, N.A. v. Schmidt,* 546 U.S. 303, 310-12 (2006).

§ 371(a) requires national banks to comply with the uniform interagency real estate lending standards established under 12 U.S.C. § 1828(*o*). One of the interagency standards requires national banks to adopt lending policies which promote "[c]ompliance with *all real estate laws and regulations*, including *anti-discrimination laws*." 12 C.F.R. Pt. 34, Subpt. D, App. A (OCC's version of uniform standards, under the heading "Loan Portfolio Management Considerations") (emphasis added). On its face, this interagency standard requires national banks to comply with "all" non-preempted state laws applicable to real estate loans, including N.Y. Executive Law 296-a. Accordingly, § 371(a) does not empower OCC to adopt a regulation that undermines the compliance duties of national banks by blocking New York's ability to enforce § 296-a.

Separately, under 12 U.S.C. § 93a, OCC may adopt rules "to carry out the responsibilities of the office." In *Gonzales v. Oregon*, this Court held that a similarly-worded federal statute, 12 U.S.C. § 871(b), did not authorize the Attorney General to "make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law." 546 U.S. at 258. The Court explained that the Attorney General's authority to adopt rules executing "his functions" under § 871(b) did not empower him to issue a preemptive regulation that went "well beyond the statute's specific grants of authority." *Id.* at 264-65. Like § 871(b), 12 U.S.C. §§ 371(a) and 93a are "generic authorizations of rulemaking authority, . . . and neither says a word about preemption." *Watters,* 550 U.S. at 39 n.23 (Stevens, J., dissenting). Those provisions therefore "provide no textual foundation for the OCC's assertion

of preemption authority." *Id.; see also* Wilmarth, *supra* note 4, at 272-73, 299-306, 311-14 (describing OCC's lack of authority to adopt preemptive regulations under 12 U.S.C. §§ 93a and 371(a)).

OCC has also asserted that § 36(f)(1)(B) of the NBA supports its claim of "exclusive visitorial authority" over national banks. 69 Fed. Reg. 1895, 1897 (Jan. 13, 2004). Section 36(f)(1)(B) provides that state laws applicable to interstate branches of national banks "shall be enforced" by OCC. 12 U.S.C. § 36(f)(1)(B). For two reasons, however, § 36(f)(1)(B) does not sustain OCC's claim or the regulation at issue.

First, the provision applies only to interstate branches of national banks. Therefore, it cannot be construed to repeal by implication the "vested in the courts of justice" clause of § 484(a), which applies to national banks *in their entirety,* including their main offices and home state branches. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 127 S. Ct. 2518, 2532 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (internal quotation marks and citation omitted).

Second, the conference report on the 1994 legislation that enacted § 36(f)(1)(B) affirmed that "States have a legitimate interest in protecting the rights of their consumers, businesses, and communities," and that "Congress does not intend that [the 1994 law] . . . weaken States' authority to protect the interests of their consumers, businesses, or

communities."[26] The conference report further declared that "[u]nder well-established judicial principles, national banks are subject to State law in many significant respects. . . . The [1994 law] does not change these judicially established principles."[27] Thus, when Congress adopted § 36(f)(1)(B) in 1994, it clearly did not intend to override the numerous court decisions (discussed below) that had previously upheld the States' authority to enforce valid state laws against national banks.

B. The Courts Have Repeatedly Upheld the States' Authority to Use Judicial Proceedings to Enforce Their Laws Against National Banks.

In two cases decided soon after Congress passed the 1864 Act, this Court affirmed the right of state and local officials to sue national banks to enforce valid, non-preempted state laws. Neither decision mentioned the NBA's restriction on "visitorial powers."

In *Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362-63 (1870), the Court held that Kentucky's lawsuit to collect taxes from a national bank was "no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it." In *Waite v. Dowley,* 94 U.S. 527, 534 (1877), the Court held that a Vermont statute, which authorized judicial enforcement of a

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[26] H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

[27] *Id*.

national bank's duty to furnish shareholders' names and addresses, was a "proper exercise of the rightful powers of the State."

Subsequently, this Court sustained the authority of state attorneys general to file *quo warranto* actions to enforce state laws against national banks. In *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), the national bank and the United States argued that Rev. Stat. § 5241 – the predecessor of 12 U.S.C. § 484(a) – barred Missouri's attorney general from suing the bank. *See id.* at 643 (summary of bank counsel's argument); *id.* at 645 (summary of Solicitor General's argument). The Court, however, rejected the federal government's claim of exclusive enforcement authority and upheld the Missouri attorney general's power to institute judicial proceedings to enforce the State's law. The Court declared emphatically that "the power of enforcement . . . is essentially inherent in the very conception of law." *Id.* at 660. The Court further explained that Missouri was seeking "to vindicate and enforce its own law" and was "neither seeking to enforce a law of the United States nor endeavoring to call the bank to account for an act in excess of its charter powers." *Id.*[28]

This case presents a situation that is indistinguishable from *St. Louis.* The New York Attorney General is seeking to enforce a valid state law that prohibits discrimination in lending and

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[28] *See also First Nat'l Bank of Bay City v. Fellows,* 244 U.S. 416, 427-28 (1917). For additional court decisions upholding the authority of state officials to sue national banks for violations of state law, *see* Pet. App. 50a-51a (Cardamone, J., dissenting).

applies to national banks. Such enforcement does *not* interfere with the charter powers of national banks or restrict bank activities that are authorized by federal law.

In a 1999 case, OCC conceded the States' authority to seek judicial enforcement of state laws against national banks. In *First Union Nat'l Bank v. Burke*, 48 F.Supp.2d 132 (D. Conn. 1999), OCC obtained an injunction to prevent Connecticut's banking commissioner from issuing administrative cease-and-desist orders against three national banks. OCC argued that "Congress intended the OCC to have exclusive administrative enforcement authority over national banks for all laws, including state banking laws." *Id.* at 135. The district court agreed with OCC but also declared that "a state may seek enforcement of its state banking laws in either federal or state court" by reason of the "vested in the courts of justice" clause in 12 U.S.C. § 484(a). *Id.* at 146.

The *Burke* court rejected the Connecticut banking commissioner's Tenth Amendment claim. However, the court emphasized that its injunction "expressly leaves available judicial remedies to compel national bank compliance with state law" and would not "preclude the [Connecticut commissioner] from seeking enforcement of this state banking statute against the plaintiff national banks through the courts." *Id.* at 149, 151. OCC "acquiesced to" the *Burke* court's 1999 determination. *See* Pet. App. 109a (decision below of the district court). It was not until 2004 that OCC amended 12 C.F.R. § 7.4000(b)(2) to bar state officials from seeking judicial enforcement of state laws against national banks. *Id.* at 109a-111a.

OCC's regulation conflicts with the "vested in the courts of justice clause" of 12 U.S.C. § 484(a) and exceeds the agency's authority under the NBA. By closing off every avenue for the States to enforce their laws against national banks, the regulation creates the same Tenth Amendment problems that the *Burke* court carefully avoided. *See Burke*, 48 F.Supp.2d at 145-46, 149. Accordingly, this Court should invalidate the regulation.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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